CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for Environmental Law & Policy

March 31, 2006

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SENT VIA EMAIL ONLY

The Center for Environmental Law and Policy (CELP) submits the following comments regarding the DRAFT "Department of Health and Department of Ecology Proposed Approaches Regarding Service Area, Compliance, and Consistency" document relating to how the agencies interpret Section 5(2) of the Municipal Water Law. We appreciate the opportunity to provide this feedback and request a written response indicating how our comments were considered.

Overall, one critical component of addressing these issues is using proper legal terms that relate back to the statute being interpreted. For instance, the terms "utility," "purveyor," "water system," and "entities" are used interchangeably to apparently refer to a "municipal water supplier." However, as used in this document these terms have no legal meaning and will only lead to ambiguity. They should, in all cases, be changed to "municipal water supplier"—that term is defined in the Municipal Water Law (MWL) and is the subject of Section 5(2).

1. What is the definition of "service area" referenced in the Municipal Water Law – Section 5(2)?

The answer provided is too ambiguous to be of much assistance in interpreting this section. To say the service area includes the "retail service area" and the "area outside the retail service area if applicable" gives almost no guidance to identifying an actual service area. "Service area" should be defined as it is in DOH statutes (RCWs) and rules (WACs). If no such definition exists, it should be defined as it is in DOH guidance documents that do provide such definitions in accordance with commonly accepted and understood industry standards. If necessary, and in order to avoid confusion, the agencies should specifically refer to all possible areas within a service area—existing areas where facilities exist, areas where future service is intended, retail service area, satellite management areas and wholesale areas.

There is no guidance or explanation in this answer about the timing of the point at which a service area becomes the place of use on a water right. Is this a retroactive function that occurred at the date at which the MWL became effective? Does it apply to future approvals of water system plans, or past approvals. If the answer is past approvals, which past approvals? Those pre-dating the effective date of the MWL, or those made after the MWL became effective.

Nor does the answer explain the practical application of the water right holder being notified, and the public notification of what the place of use becomes. Do water rights become physically

changed? Because this function is by operation of law and no physical changes occur to a water right, how does DOE track this information as required by RCW 90.54.030?

2. At what point will "in compliance with the terms of the WSP or SWSMP" referenced in the Municipal Water Law – Section 5(2) be determined and who will make that determination?

We disagree that DOH and DOE should jointly make a determination of "in compliance with the terms of the WSP or SWSMP." Compliance with these documents should be solely determined by DOH, which has the expertise and authority to determine such compliance. We disagree that this statute, although living within Ch. 90.03 RCW, gives DOE authority for this determination. Rather, it specifically relates back to and relies on the "effect of the department of health's approval . . . ." Therefore, DOH is specifically identified as the agency responsible for this determination.

Though we agree that compliance with a WSP or SWSMP is required at all times, we believe the agencies' statement that they will not actively investigate compliance improperly abrogates their legal authority, which the agencies do NOT have authority to do and violates the mandates in RCW 90.03.386. The MWL clearly contemplates that public water suppliers must **always** be in compliance with the terms of a WSP or SWSMP, not only at the point at which these plans are approved by DOH. We recommend considering confirming that if DOH determines at any point that a water supplier is not in compliance with such plans, that it notify DOE of such noncompliance. This notion transfers to application of §14 as well, which deals with DOE's processing of transfer/change applications. We believe the agencies should consider additional ramifications for noncompliance besides lack of qualification for a service-area-based place of use. For instance, if a municipal water supplier is out of compliance with a WSP or SWSMP, but has a pending application for an extension, water right transfer, or some other action from DOE or DOH, those requests for action should be not be granted to a noncompliant municipal water supplier. What mechanism will be used to ensure DOE actions occur only if a municipal water supplier is compliant with the terms of a WSP or SWSMP? I have personally reviewed hundreds of DOE Reports of Examination (ROEs) and do not recall a single confirmation by DOE that the municipal water supplier is compliant with a WSP or SWSMP at the time of approval of a water right decision. In fact, often, a water right holder that clearly falls within the legal definition of a municipal water supplier is not even informed through the ROE they are indeed a municipal water supplier and have legal obligations under the MWL.

This answer also fails to address the timing and practicality of the effects of noncompliance on a service-area-based place of use. At what point in time does a place of use change? Are places of use forever dynamic, dependant on extent of compliance with a WSP or SWSMP? What does this mean to potential new uses and new connections who are trapped in a service area that has no legal place of use? How will this provision be enforced by the agencies? How will municipal water suppliers be notified?

3. What elements of a WSP or SWSMP will be considered in DOH's determination of "in compliance" for the purpose of Municipal Water Law – Section 5(2)?

DOH and DOE have no discretion under Section 5(2) to choose or limit the elements of a WSP or SWSMP that are considered "in compliance." **ALL elements must be in compliance at all times to trigger the change in place of use of a water right for a municipal water supplier.** For convenience, we do not oppose a checklist of items that DOH and DOE will consider as part of their evaluations as long as it is clarified that ALL elements must be in compliance. We propose the following items for a checklist:

FOR WSPs:
-water system described
-planning data & demand forecast provided
-system analysis
-all water use efficiency requirements, including but not limited to:
    -data collection and reporting
    -conservation planning
    -goal setting
    -performance reporting
    -leakage performance
-source water protection in accordance with WAC 246-290-135
-operation and maintenance program
-demonstration of financial viability
-SEPA considerations for >1,000 connections
-descriptions are provided for >1,000 connections as required by MWL Section 5(3)
-evaluation of reclaimed water for >1,000 connections

FOR SWSMPs:
-all elements required by WAC 246-290-105 are included in the SWSMP
-all water use efficiency requirements that apply to the municipal water supplier in question

Lastly, of the elements indicated, we fail to see how a determination of compliance with a "plan approval date" or "identification of service area" could be made. These elements should be clarified.

4. How will "consistency" / "not inconsistent" with adopted comprehensive plans, land use plans, or development regulations, and watershed plans as it relates to the Municipal Water Law – Section 5(2) and Section 8 be determined?

We disagree that "not inconsistent" determinations are only required if a municipal "requests" a place of use expansion. There is no permissive authority granted to municipal water suppliers to request a place of use expansion in Section 5(2). On the contrary, this expansion occurs as a

function of law assuming compliance with a WSP or SWSMP and determinations of compliance as indicated in the last sentence of Section 5(2).

We strongly disagree that municipal water suppliers should be responsible for completing a "consistency/not inconsistent" checklist. The consistency obligation falls to DOH and is properly referred to counties or local governments with jurisdiction over the various comprehensive plans, land use plans, or development regulations indicated in Section 5(2). Not only is a deferral of this function to municipal water suppliers akin to allowing a fox to mind a henhouse, it is not practical because municipal water suppliers are not likely to have access to and accurate understanding of the applicability of these legal documents and regulations. We have very little faith in the abilities of smaller water systems, particularly, to do a credible analysis of the effect of the alteration of their water right place of use as it relates to these various plans and regulations. We agree there should be some mechanism to address local governments that refuse to provide such determinations, or that are unable to make such determinations in a timely fashion, but there must be evidence that a municipal water supplier requested this determination be made by an appropriate local government and that no determination was forthcoming. The onus is on DOH to confirm the status of the determination with the appropriate local governments.

We do not understand why DOE has an interest to develop a method to solicit comments from interested parties regarding consistency with watershed plan documents. This is a regulatory requirement of DOE and should not be deferred to public comment. Nor do we believe public comment is appropriate. Such a requirement will only delay this process unnecessarily. Again, after personally reviewing hundreds of ROEs, I have yet to see a statement of consistency with a watershed plan as required by Section 5(2). **DOE must stop spinning its wheels around establishing a process to make these determinations and start making them.**

DOH and DOE should ensure, by providing a detailed plan in this document, that they are working together to make sure the fruits of their labors are cross-communicated and communicated to the affected municipal water suppliers. So far, ROEs are NOT reflecting any evidence that DOE and DOH are doing these determinations and working together to make sure this information is incorporated into water right decisions.

Because DOH's approval of a WSP or SWSMP triggers a change in a water right place of use, how will DOE be notified of the change, and how will the functional change be recorded by DOE so the public has access to the information defining a water right place of use?

5. What are the effects to a utility of failing to meet the WSP or SWSMP service area compliance or "not inconsistent' requirements found in the Municipal Water Law – Section 5(2)?

CELP agrees that continued compliance and consistency is a must for maintaining a service-area-based place of use. We disagree strongly, however, that the agencies take no further steps to monitor compliance after the initial determinations at WSP/SWSMP approval.

How will reversion to an original water right place of use occur? How will DOE be notified and what steps will it take to make this information public? This document does not address the situation of continued noncompliance and displacement of existing water users outside a legal place of use. It appears there are really no negative legal ramifications for noncompliance, and therefore, few incentives for compliance. There must be some additional mechanism to address extreme noncompliance in a manner that does not frustrate the overall purpose of the MWL to encourage viability of public water systems and discourage the proliferation of smaller water systems.